87-226

Supreme Court, U.S.
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NO._____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

IRVIN M. BEAUFORD,

Petitioner,

-vs-

SISTERS OF MERCY, PROVINCE OF DETROIT INC., and CLARK BOWMAN, SR., Jointly & Severally,

Respondents,

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

QUESTIONS PRESENTED FOR REVIEW

I. **WHETHER THE 6TH CIRCUIT COURT OF APPEALS HAS ENTERED AN OPINION IN CONFLICT WITH DECISIONS OF OTHER CIRCUITS AND THIS COURT WITH REGARD TO THE BURDEN OF PROOF IN AN EMPLOYMENT DISCRIMINATION MATTER?**

PETITIONER-APPELLANT SAYS **YES**

COURT OF APPEALS, DISTRICT COURT AND APPELLEE SAY **NO**

II. **WHETHER THE COURT OF APPEALS HAS WRONGLY APPLIED THE STANDARDS FOR PUNITIVE DAMAGES UNDER THIS COURT'S OPINION AND OPINIONS OF OTHER COURTS OF APPEALS?**

PETITIONER-APPELLANT SAYS **YES**

COURT OF APPEALS, DISTRICT COURT AND APPELLEE SAY **NO**

III. **WHETHER THE COURT OF APPEALS HAS VIOLATED THIS COURT'S OPINIONS AND THE OPINIONS OF OTHER COURTS WITH REGARD TO THE RIGHT TO A TRIAL BY JURY?**

PETITIONER-APPELLANT SAYS **YES**

COURT OF APPEALS, DISTRICT COURT AND APPELLEE SAY **NO**

IV. **WHETHER THE COURT OF APPEALS WAS NOT CORRECT IN FINDING PLAINTIFF-PETITIONER WAIVED HIS RIGHT TO CLAIM DEFENDANT DID NOT PROPERLY MOVE FOR A JNOV?**

PETITIONER-APPELLANT SAYS **YES**

COURT OF APPEALS, DISTRICT COURT AND APPELLEE SAY **NO**

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STATEMENT OF JURISDICTIONAL GROUNDS

The Judgment appealed from was entered on June 24, 1985, against the Plaintiff-Appellant here. That judgment was appealed to the 6th Circuit Court of Appeals, which entered a first opinion on April 22, 1987 (U.S. C/A. 6th Cir., No. 85-1477/1631). Subsequently, a Motion for En Banc Review and Rehearing was filed timely, which was denied by the Court of Appeals in a decision filed June 29, 1987.

This case involves a federal question being an alleged violation of 42 USC 1981. See 28 USC 1331.

STATUTE INVOLVED

42 USC 1981.

All persons within the jurisdiction of the United States shall have the same right in every state and territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal beneifts of all laws and proceedings for the security of persons and property as is enjoyed by White citizens, and shall be subject to like punishment, pain, penalties, taxes, licenses, and exactions of every kind and to no other.

STATEMENT OF THE CASE:

Plaintiff-Appellant-Petitioner, filed his Complaint in this matter on October 17, 1983, in the United States District Court for the Eastern District of Michigan, alleging a violation of 42 USC 1981. Trial began on his Complaint on October 22, 1984 and ended on October 30, 1984, with a verdict in favor of the Plaintiff for nominal damages in the amount of ONE ($1.00) DOLLAR, versus each of the two Defendants, and ONE HUNDRED FIFTY THOUSAND ($150,000.00) DOLLARS, in punitive damages, also versus each of the two Defendants.

A verdict was entered on a special verdict form where the jury clearly found that both Defendants had discriminated against the Plaintiff on the basis of his race.

Defendant moved for a Directed Verdict, Judgment Notwithstanding the Verdict, New Trial, or Remittur, on November 9, 1984, which Motion was heard on or about February 11, 1985. In a memorandum Opinion dated June 4, 1985, the Honorable Ralph M. Freeman granted

Defendant's Motion, pursuant to Rule 50, finding that Plaintiff, had on two counts, (using counts in the separate factual situation), not presented a prima facie case, and on the other not preponderated. Judgment was entered on June 24, 1985 by the District Court, and two Notices of Appeal were filed, one on June 12, 1985 after the memorandum Opinion, but before the Judgment, and one on July 18, 1985. The two appeals were consolidated.

Plaintiff appealed to the 6th Circuit Court of Appeals which, on April 22, 1987, decided and filed its decision reversing Judge Freeman on one issue, granting Plaintiff nominal damages, but upheld Judge Freeman on the issue of punitive damages. The Honorable George Edwards dissented in this 2-1 decision.

In a timely fashion thereafter, Plaintiff requested En Banc Review and Rehearing which was denied in a decision filed and dated June 29, 1987.

The Plaintiff had presented three issues. First, he presented a promotional issue saying he should have gotten the promotion that a White co-worker in fact did get. The Court of Appeals found for Plaintiff on this

issue, so Plaintiff is not asking for certiorari on it. Second, the Court found affirming Judge Freeman, that the Plaintiff had not preponderated on his retaliation issue. Plaintiff does not appeal from that issue here either. Third, the Court of Appeals upheld the District Court's Judgment Notwithstanding the Verdict on the issue of the "private police force" which Plaintiff alleged was racially motivated and had disabled him. It is from this decision from which punitive damages also flow, that the Plaintiff requests this Court grant his Petition for Certiorari.

At the time of trial, Plaintiff was 43 years old. He is a Black male who is married and has two minor children. He has a 10th grade education and gave a history of various jobs prior to Defendant-Appellee, during which he had no racial problems. (Trans. V.1, Pgs. 118-124).

Plaintiff was hired as, and continued to work as a boiler room operater at Defendant's Ferndale campus. He would control the buildup of chemicals; blow sediments out of the mud room; handle the gas fired units; insure

that there is not excess gas in the combustion chamber which could cause an explosion or loss of lives. (V.1, Pgs. 126-128). There is no evidence at all in the record that the Plaintiff was anything but an exemplary employee. In fact, at the time of the incident involved, Plaintiff was holding down two jobs, one with Defendant, and one with the City of Detroit.

The Court of Appeals found that Bowman, who did promote a White over the Plaintiff, had engaged in racial discrimination against the Plaintiff. The Plaintiff had a boiler room operater license, and the White who got the job did not. The evidence showed that the three boiler operators who were Black, were all required to have licenses, whereas none of the Whites did. (V.1, Pg. 128-131). The White who took over the supervision of the boiler room, replaced a Black who was discharged. (V.1, Pgs. 145-146).

The central event involved occurred on November 8, 1982, approximately two months after the racially motivated promotion occurred. Plaintiff was working the midnight shift in the boiler room. He testified:

"I was sitting at my desk and I had my hand like this (witness indicating), and I was watching the gauges. That's what I was doing. I was watching the gauges.

The Court: All right. Go ahead.

Witness: Then all of a sudden someone appeared at the window.

Question by McIntyre: Excuse me. Were you facing the window?

Answer: Yes - yes, because my desk was ' like, here, and here is the window, up, you know up like so.' (V.1, Pgs.152-153).

The face in the window startled Plaintiff and he jumped up to chase the person who he saw there because he did not believe anyone was supposed to be on campus after midnight. Unfortunately, he fell in an open gutter line, injuring himself and has in fact been unable to work at any job ever since. Nevertheless, after the fall, he got up and discovered that Clark Bowman Sr.'s son, Clark Bowman, Jr. - was running off into the dark. Bowman, Jr., admitted that he had looked into the window that night and said that he was "checking". Bowman, Jr., said he was working for the head of security and would say nothing further. (V.1, Pg. 155).

The Head of Security testified that he created a special patrol, which startled Mr. Beauford in November of 1982. He had asked Clark Bowman, Jr., to patrol the campus on that night. The reason that he gave for that extra patrol, despite the fact that uniformed guards were working that night, had been alleged vandalism and injuries to security guards. (V.3, Pgs. 86-87). This separate vigilante type unit was created of Clark Bowman, Jr.; Chris Townsend, who was Head of the Grounds Crew, and who had been quoted as using the term "nigger", before; Mr. Horton, who was the White who got the job over the Plaintiff; and Vern Smith, a garage mechanic. All are White. (V. 3, Pgs. 89, 92, 98-99). The precipating incident for the guard unit was allegedly minor vandalism with controls and shutoff valves in two of the buildings. (V.3, Pg. 88). Yet, Parker, the Head of Security, testified that he asked Bowman Jr., only to look on the outside of the buildings on the night in question.

Parker also testified that if a security guard found one of the "vigilantes" on the grounds, that they would

be questioned and Mr. Parker would be called. Nevertheless, he said that this was not a secret system. (V.3, Pgs. 102-103, 106). Parker testified that in fact, he suspected those whom he appointed to this special vigilante unit and everybody else. (V. 3, Pg. 104). Further, he testified that the problem did continue despite the vigilante unit. (V.3, Pg. 107).

Clark Bowman, Sr., had known Parker from a small town when he worked there, and he confirmed that he gave Parker the security job after firing a Black named John Respress from that position. (V.4, Pgs. 18-21). He also confirmed that he authorized the alleged vigilante system before it was instituted by Parker. (V.4, Pg. 38).

While there is no evidence in this record as to who else besides Plaintiff the vigilante system spied upon, there is evidence in the record to show that the midnight guards, were Black, and that Plaintiff, in the boiler room, was also Black.

The incident with Clark Bowman, Jr., on November 8, 1982 occurred on the same day the Plaintiff had gone

to the State Civil Rights Commission to complain about his lost promotion (See Exhibit L.).

Further, there is evidence that other Black employees were spied upon by a group other than the regular guards on more than one occassion. Cora Martin, a Black guard herself, testified that she had been followed by someone and fired for leaving the premises while she was supposed to be working. (V.2, Pgs. 17-18). Parker told her she had been followed by Pinkertons. (V.2, Pg. 19).

Her supervisor, John Respress, who also was fired the same day as Ms. Martin, was also told he had been followed by Pinkerton guards. (V.2, Pg. 107). Bowman, Sr., in firing Respress, "went into a rage and he was just hollering". (V.2, Pg. 106). In fact, Respress had been followed by Clark Bowman Sr.'s daughter, Robin, who is also a guard at the Defendant, one day, in the corporation's car. (V.3, Pg. 11).

In short, there are four instances of impromptu spying by the Defendant Corporation on Black employees in this record, and no such instances on White employees.

The record is also replete with references to other racial situations. Besides Mr. Beauford's denied promotion, Cora Martin testified that though she was fired for leaving the premises while supposedly on duty, that there was a White who did the same thing and was never disciplined. (V.2, Pgs. 20-22). She also testifed that there was a White guard who got overtime a Black should have had; a White guard and family using the swimming pool, when Black guards were told not to use the pool on off hours; and a White guard using Defendant's equipment to jump her car, which was also against the rules. (V.2, Pgs. 26-33).

Another Black boiler operator, Ed Calhoun, testifed that he had to have a license in order to get the job of boiler operator. He was aware of a White who had the job who had no license. (V.2, Pg. 45; 51-55). Calhoun testified that after Mr. Bowman, Sr., arrived blatant racist behavior began to appear. Calhoun overhead Robin Bowman use the term "nigger". (V.2, Pgs. 56-59). He saw, on a Black guard's van, the word "nigger" painted while it was parked in Defendant's

grounds during a time that access to the grounds were restricted to employees. (V.2 Pg. 60-62; V.3. Pg. 76-77). Calhoun felt that Robin Bowman's confederate flag on her jeep was an indication of her attitude towards Blacks, and he overhead Martin being fired in the open, with other employees overhearing it, and testified she was given no reason for her discharge. (V.2, Pgs. 64-65). Calhoun testified that he heard Chris Townsend also use the term "nigger". (V.2, Pgs. 70-71).

The significance of these events is that Robin Bowman, who is one of the people who followed Respress, and Chris Townsend, who is one of the members of the guard system, were both persons quoted as using racial language.

Respress, who had been Security Supervisor, also testifed as to various incidents he thought were racial. He pointed out that two white guards were discharged while he was supervisor, but that both had been given at least two, if not more warnings, before they were fired. (V. 2, Pgs. 92-96). Those two were discharged for the offenses of bringing a large dog to work, which

frightened some of the nuns on the campus, and the other for bringing a gun to work repeatedly, which also was not allowed. Martin and Respress, however, received no warnings and were simply fired for leaving the premises when they were allegedly supposed to be on duty, behavior which is clearly less dangerous than bringing a gun on the campus.

The only other Black fired also was given no warning. (V.2, Pg. 98). Respress testified that when he complained in meetings about the behavior of Robin Bowman, who often put in for more hours than she worked, Bowman would get angry. It was very clear to Respress that "this kid hated the Black employees." (V.2, Pg. 112). Respress also heard Robin Bowman say to Chris Townsend, the term "nigger". (V.2, Pges 112-114). Further, Respress felt that Robin Bowman and Clark Bowman, Sr., made it a point to harass Black employees. (V.2, Pgs. 114-115). He mentioned Whites who would leave the premises two or three times without getting a warning. Whites who brought scuba diving gear to work. Whites who brought a gun to work without getting into

serious trouble. Whereas Blacks would get written up and even discharged on a first offense. (V.2, Pgs. 116-120). One White even stole from Mercy Center and did not get disciplined. (V.2, Pg. 120).

Tom Parker could leave the grounds at will and return at will. Chris Townsend had the same right and even returned one day inebriated. (V.2, Pgs. 121-125). Another White would leave the premises every payday to do his grocery shopping which would be observed by Bowman, Sr. (V.2, Pg. 126). Another White would leave regularly as well, just to get coffee, with Bowman's blessing. (V.2, Pg. 127). Respress also testified that Black boiler operators were required to have a license and Whites were not. (V.3, Pgs. 4-5). Respress believed the Robin Bowman painted the word "nigger" on the Black's car because she was working that shift with the Black guard. (V.3, Pgs. 14-15). Respress complained to higher management regarding some of the racial incidents, to no avail. (V.3, Pg. 12-13). In fact, Respress heard Bowman, Sr., utter deragatory racial terms. (V.3, Pg. 4).

The Defendant advanced the reason for the special patrol, that they were attempting to stop vadalism. They were trying to stop breakins by kids during the winter. This was not a winter month, h was late fall, therefore it is clear that the incidents in question occurred many months prior to establishing this patrol. (V.3, Pgs. 86-87). Plaintiff testified that in fact, there were no such incidents during the time close to establishing this impromptu guard unit As the sole boiler room operator on midnights, he would receive reports from the guards every hour on the hour, and keep the log book. No such incidents were in the log book to Plaintiff's knowledge, in the period of time prior to his injury. (V.1, Pg. 156). Neither the Defendant nor the Plaintiff offered this log book at trial, but no one rebutted Plaintiff's testiony either.

The federal jurisdicton involved here is pursuant to 28 USC 1331 and 42 USC 1981.

ARGUMENT I:

BOTH THE COURT OF APPEALS AND DISTRICT COURT APPLIED THE WRONG STANDARD OF PROOF IN THIS DISCRIMINATION MATTER.

In McDonnell Douglas -v- Green, 411 U.S. 792 (1973), the court found that in order to establish a rebuttable presumption that racial discrimination occurrs in a promotion case, that a plaintiff need only show that he/she is a member of a protected group; applied for a particular promotion; was qualified for that promotion; despite his/her qualifications was rejected for the prmotion; and, that the employer continued to search for someone to fill the job. The purpose of this prima facie standard was simply to eliminate certain standard offenses in promotion cases, such as that the Plaintiff didn't apply or wasn't qualified, or that the position wasn't really open.

The Defendant may rebut this prima facie case by establishing a legitimate non-discriminatory reason for the employment action. If, however, the legitimate non-discriminatory reason turns out to be untrue or

unexplained then the plaintiff has proved pretext and a finding of discrimination may still be made.

The issue of pretext and the prima facie case are merged at the point the finder of fact looks at all the evidence to make the ultimate decision as to whether or not in fact discrimination occurred. Texas Department of Community Affairs -v- Burdine, 450 U.S. 248 (1981); U.S. Postal Service Board of Governors -v- Aikens, 460 US 711 (1983); Furnco Construction Co. -v- Watters, 438 U.S. 567 @576 (1978); and International Brotherhood of Teamsters -v- United States, 431 U.S. 324 (1977).

All the cases have suggested that a flexible approach is necessary to the issue of what constitutes a prima facie case. See Green at footnote 13, Supra.

The Court of Appeals, however, found:

> "...the District Court's judgment NOV was appropriate with regard to the plaintiff's claim of discrimination premised upon the alleged 'spying' incident.... The plaintiff produced no evidence whatsoever that he was treated differently from White employees or singled out for surveilance or any other form of 'spying', nor did he indicate at the time that he complained of the incident, that he believed it to be racially motivated. Moreover, the Defendant's articulated legitimate non-

> discriminatory reason for the impromptu patrol as designed to curb vandalism remained unrebutted at the conlusion of all the evidence.... Finally, the plaintiff's evidence of isolated racial incidents or epitaths or purported disparate treatment of certain other Black employees was wholly unsupported by facts and was not connected with any asserted unlawful conduct regarding the plaintiff." Beauford -v- Sisters of Mercy, No. 85-1477/1631 (April 22, 1987), pgs. 6 & 7.

The Circuit Court's analysis in this matter flies in the face of all of the aforementioned Supreme Court decisions. The first issue is whether the plaintiff presented enough evidence to show a prima facie case of racial discrimination here. The Plaintiff's evidence showed that he was spied upon by the impromptu spy network. It also showed that he was a member of a minority group, and that he was doing a job for which he was qualified and that in fact, there was no reason to suspect him of any wrongdoing. As an analogy to McDonnell Douglas and the other cases cited hereinbefore, it is clear that Plaintiff has produced evidence that he is a member of a minority group; that he was doing a job for which he was qualified at the time of the alleged race discrimination; that in fact, a member of the guard

unit did spy upon him; and that said spying did cause serious injury. To go farther, however, Plaintiff also proved that the "spy system" was created by and made up of all White male employees, and that the employees asked to participate in the system were not those who normally had any sort of guard duties. In fact, most of them had completely different regular duties. So what plaintiff proved is that an all White spy system was set up at the Sisters of Mercy, out of employees who had no regular guard duties and in fact, one of whom was a simple mechanic, and that it was sent around the campus to spy, and did so upon the plaintiff. This was done in an atmosphere of racial disharmony.

The Court of Appeals would require that the Plaintiff show much more than this to establish a prima facie case, and in fact, is openly shifting the burden of proof in this situation. The Court of Appeals would require the plaintiff show he was "treated differently from White employees, or singled out for surveilance," or that at the time he complains of the incident he has

to have complained that "he believed it to be racially motivated."

There is absolutely no requirement anywhere in the law, that at the time of an alleged racial action, that the victim must immediately come forward and complain to the employer that he/she believes the actionn was racially discriminatory. At any rate, in this case, evidence was offered to show that the Plaintiff did complain that he thought it was a racially discriminatory action but feared claiming racism at the time of the injury. (V. 1, Pgs. 180-182). Nevertheless, the Court of Appeals has put into place, a requirement for a prima facie case, that an employee who is discriminated against must immediately so complain to the employer before they can show a prima facie case. Nowhere in the caselaw is any such requirement present.

Further, the 6th Circurt would require that the Plaintiff show that he was treated differently than White employees or singled out for surveilance as part of his prima facie case. This too, is nowhere in the case law. All plaintiff need do is establish enough evidence to show

the employer's own testimony shows that whatever vandalism they were concered about had occured months in advance. Instead, what was going on was that the employer had just had a major change in management personnel in that Respress had been discharged and in his place was Ms. Parker, and Beauford was not promoted to the manager job in the boiler rom, but Horton was. This group of white managers who had just taken over set up their impromtu network.

There is no evidence in this case that the employer involved ever spied on any Whites.

Further, there is evidence of disparate tretment handed out by bowman Sr., to Respress and Martin as opposed to two White guards; there is evidence of racial namecalling by persons who were involved in the impromptu spy system or in following Black employees; there is evidence that Bowman, Sr., and Parker both blew up at Black employees, one of whom was the plaintiff; and in general, there is clear evidence that the Defendant here violated Plaintiff's rights.

an inference of racial discrimination. See Burdine, Supra; Aikens, Supra. For the court to require this piece of evidence as part of a prima facie case, is simply contrary to the law. In fact, the 6th Circuit itself has held, in a prior case, Rogers -v- Fisher Body Division, General Motors Corp. 739 F2nd 1102 (6th Cir., 1984), that in a disparate treatment case, such as the one at bar, evidence of a history of discrimination or a pattern of discrimination was not required.

Further, the Beauford case directly contradicts Yarbrough -v- Tower Oldsmobile, Inc. 789 F2nd 508 (7th Cir., 1986), the court specifically found that evidence of White employees who were treated more favorably than the discharged plaintiff, was not necessary in that disparate treatment case. Yarbrough, Supra, @512.

The 6th Circuit also downplays the history that actually was proved here, and suggests there was no evidence of pretext. The reason given for the impromptu patrol was to prevent vandalism. The evidene shows that the impromptu patrol had no such effect; that in fact there had been no vandalism to prevent, and that even

Thus, the Plaintiff not only established a prima facie case, but also clearly rebutted the alleged non-discriminatory reason by showing that in fact, no vandalism had occurred to prevent.

Therefore, the Court of Appeals must be reversed, especially since it is in conflict with the 7th Circuit and with decisions of this Circuit and would substantially change the burden of proof in a racial discriminaton claim.

ARGUMENT II:

THE COURT OF APPEALS DECISION ON PUNITIVE DAMAGES SHOULD ALSO BE REVERSED.

The Court of Appeals found that:

> "in the absence of any evidence of egregious conduct, willfulness, or malice on the part of the defendant, the District Court correctly concluded that it was improper to permit the jury to find that either Bowman or the Sisters acted with evil intent or callous, or reckless, or egregious disregard of the plaintiff's federal rights, assuming arguendo that their conduct constituted purposeful discrimination in the first instance. Beauford, Supra @ Pg.8.

The first issue here is whether plaintiff need prove more than a prima facie case in this situation to recover punitive damages. The 6th Circuit obviously believed that to be the case, in direct contradiction of Block -v-

R.H. Macy & Company, Inc., 712 F2nd 1242 (8th Cir., 1983). The purpose of awarding punitive damages is to punish a wrongdoer for outrageous conduct and deter others from engaging in such conduct. Yarbrough, Supra @Pg. 514; McKinley -v- Trattles, 732 F.2nd 1320 and 1327 (7th Cir., 1984). Unlike the 6th Circuit, the 7th Circuit has not ignored the phrase used in Smith -v- Wade, 461 U.S. 30 @Pg.56 (1983), that punitive damages may accrue if the plaintiff can show reckless or callus indifference to the federally protected rights of others. The jury must make a moral judgment that punishment would be served by an award of punitive damages. See McKinley, Supra @1326.

It seems to be clear that the jury in this instance found that the guard system was established. Further, the employer was spying only on non-Whites. Given that, it is also clear that such behavior in and of itself, is outrageous, and a kind of behavior that requires an award of punitive damages.

Furthermore, in this matter, Parker's angry reaction to the plaintiff on November 8, 1982, after

Plaintiff complained about being spied upon is evidence that the employer was engaged in more than "simple race discrimination". Bowman, Sr., engaged in the same sort of conduct towards Respress, and Calhoun testified that Martin was publically discharged in a demeaning manner.

This court has already rejected the notion that punitive damages are appropriate only when the proofs show more than the underlying standards for liablity. The deterrent and punitive purposes of punitive damages would not be served by such a requirement. Smith -v- Wade, @103 S.Ct. 1638. The jury must find that the Defendant's conduct met the threshold requirement of discrimination under 41 USC 1981 and that the conduct merited a punitive award for a discretionary moral judgment.

There is a clear conflict between the 8th Circuit and 7th Circuit and the 6th Circuit decisions regarding whether or not the plaintiff must prove mor than intentional discrimination as is already required, under 42 USC 1981, in order to achieve the threshold necessary to get punitive damages. The purpose of punitive damages

is to deter wrongful conduct based on a moral judgment. Since the alleged wrongful conduct here, with which the jury obviously agreed, was setting up a private all-White racist spy system, it is clear that the award of punitive damages is appropriate if the plaintiffs met the standard of proofs required under 42 USC 1981. See also, Hunter -v- Allis Chalmers Corp. Engine Division, 797 F2nd 1417 (7th Cir., 1986 - where the court awarded punitive damages when an employer fired Black workers for making well founded complaints about persistent acts of racial harassment); Spower -v- Shuler, 777 F2nd 1431 (11th Cir.., 1985).

In short, the 6th Circuit has erred and has substantially charged the caselaw, not only of this court but in conflict with the 7th, 8th and 11th Circuits, with regard to punitive damages.

ARGUMENT III:

THE DISTRICT COURT AND COURT OF APPEALS HAVE CLEARLY INVADED THE PROVINCE OF THE JURY IN THIS CASE.

As this court is aware, jury trials are a fundamental right of our system. The standard for taking a verdict from a jury is high, and shows the importance of a jury trial. The defendant must show that reasonable minds could not differ as to the conclusions to be drawn from the evidence. The assumption the court has had to make in taking this punitive damage verdict away is that the jury was not acting reasonably.

Since the court was misapplying the burdens of proof, the Judgment NOV must be set aside. In Anderson -v- City of Bessemer, N.C., 470 U.S. 564 (1985), this court found that jury trials are important and that the court cannot be allowed to substitute their view for that of the jury. That is clearly what happened here.

The jury found that not only did discrimination occur, but that it also required a substantial punitive damage verdict. Obviously, the jury felt that based on

the evidence, the defendant had engaged in serious conduct of establishing a racist spy system at its Farmington site. The evidence supports the jury's decision. Only Blacks were spied upon. Only Whites were spies. The Whites who were in the spy system were not hired to be guards, but in fact were groundskeepers, mechanics and plumbers. Blacks were treated differently than Whites in general by Bowman, Sr., and Blacks were called racial names by persons who were part of the spy system and who were spying upon Blacks. In fact, the court found that there was intentional racial discrimination in the promotion case. An attitude against Blacks in that area, obviously means that the attitude could affect other areas of the employer's policies and practices as well.

The only explanation offered by the employer is that it was attempting to stop vandalism which had occurred 9-10 months earlier. Plaintiff testifed that in fact, no vandalism occurred close to the time of his injury and there certainly was no reason to spy upon him.

This is the quintessential case to have a jury decide the facts. Obviously, there is a dispute over the intent of establishing the guard system. The jury also obviously found what the intent was based on evidence that is in the record. It is clear that reasonable minds could differ, and that in fact the Court of Appeals and the District Court have invaved the province of the jury.

Thus, because this case contradicts the constitutional right to a jury trial, and the Anderson case certiorari should be granted.

ARGUMENT IV

THE JUDGMENT NOTWITHSTANDING THE VERDICT WAS PROCEDURALLY INCORRECT.

Rule 50 says "whenever a motion for a directed verdict made at the close of all evidence is denied or for any reason is not granted, the court is deemed to have submited the action to the jury subject to a later determination of the legal questions raised by the motion." The defendant did not raise their motion for a directed verdict at the end of all the evidence as required by the law. Travelers Insurance Co. -v- Stanley,252 F2nd 115 (5th Cir., 1958). That means that the defendant was

unable to move for a JNOV. Little -v- Bakers Life & Casualty, 426 F2nd 509 (5th Cir., 1970).

The Court of Appeals found at footnote 3, that the Plaintiff's failure to raise this issue with the District Court was waived.

In fact, the rule is clear. A JNOV may simply not be made if the directed verdict motion is not properly preserved. The District Court itself could have made such a finding. This is a jurisdictional pre-requisite to grant a JNOV.

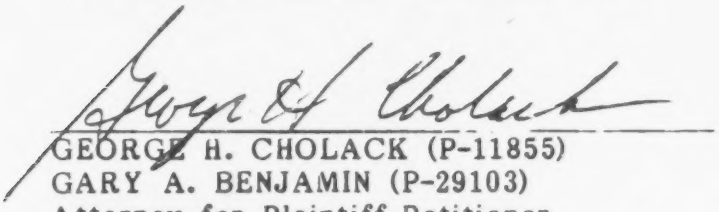
The decision of the Circuit Court is in conflict with those of the 5th Circuit and with those of the rules themselves.

It is clear that Judgments NOV are not favored. Thus, in fact, the procedural requirement should be strictly applied. In short, the courts did not have the power to grant the Judgment NOV. See Rawls -v- Daughters of Charity, 491 F2nd 141 (5th Cir., 1974);

CONCLUSION:

For the reasons stated herein this Court should grant certiorari.

RESPECTFULLY SUBMITTED:
SHRAUGER, DUNN, & ARONSON, P.C.



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APPENDIX A

RECOMMENDED FOR FULL TEXT PUBLICATION
See, Sixth Circuit Rule 24

Nos. 85-1477/1631

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

IRVIN BEAUFORD,
Plaintiff-Appellant,

v.

SISTERS OF MERCY-PROVINCE OF DETROIT, INC., and CLARK BOWMAN, SR.,
Defendants-Appellees.

ON APPEAL from the United States District Court for the Eastern District of Michigan.

Decided and Filed April 22, 1987

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Before: KRUPANSKY and RYAN, Circuit Judges; and EDWARDS, Senior Circuit Judge.

KRUPANSKY, Circuit Judge, delivered the opinion of the court. RYAN, Circuit Judge, concurred in the result. EDWARDS, Senior Circuit Judge, (pp. 10-11) delivered a separate dissenting opinion.

KRUPANSKY, Circuit Judge. The plaintiff Irvin Beauford (the plaintiff) appealed the district court's order granting the defendants' motion for judgment notwithstanding the jury verdict and, in the alternative, conditionally granting their motion for a new trial in this suit alleging race discrimination brought pursuant to 42 U.S.C. § 1981.

The record below focused on three alleged instances of racial discrimination. The plaintiff, a black male, was initially employed as a boiler operator in June of 1978 at the high school campus administered by the defendant Sisters of Mercy (the Sisters). In September of 1982, as a result of a vacancy, the position of supervisor of boiler room facilities became available. Defendant Clark Bowman, Sr. (Bowman), the director of building operations and maintenance, appointed Marvin Horton (Horton), a white male with less employment seniority than the plaintiff, to the position. Horton assumed this position in addition to his then-existing duties as maintenance supervisor over plumbing, kitchen, swimming pool, and garage activities. Bowman testified that at the time of Horton's appointment he had considered assigning the plaintiff to the vacancy, but imposed economic constraints dictated a reduction of supervisory personnel through consolidation of duties. The testimony presented at trial was conflicting on the issue of the relative qualifications of Horton and the plaintiff for the supervisory position and disclosed that Horton had supervised the plumbing and automobile maintenance departments with mechanical engineering experience in the fields of plumbing, heating, and air conditioning, whereas the plaintiff's qualifications consisted of his experience as a duly licensed boiler operator.[1]

The second charged act of purposeful discrimination occurred on November 8, 1982. On that date while working his assigned midnight shift, the plaintiff was startled by a person peering into a boiler room window. During his investigation of what appeared to be an intruder, the plaintiff stumbled over a gutter, causing injury to his back. The plaintiff's inspection disclosed that Bowman's son, Clark Bowman, Jr. (Bowman, Jr.), also an employee of the facility, together with

[1]The plaintiff filed a state civil rights complaint as a result of Horton's promotion; however, no right to sue letter was ever issued as a result of his action.

four other employees, had been assigned to patrol the entire campus after nightfall by Tom Parker (Parker), chief of security at the high school, in an effort to stem trespassing and vandalism. The plaintiff subsequently filed a written complaint with Bowman, Sr., and Sister Mary Kelly, Bowman, Sr.'s supervisor, characterizing the occurrence as a "spying" incident. Parker had not instructed Bowman, Jr., or any of the other four employees to spy on the plaintiff or any other individual.

As a result of the back injury suffered by the plaintiff during the night of November 8, 1982, he did not work through May of 1983, during which period he received workers' compensation benefits. Upon his return to his employment in May of 1983, Horton placed him on the day shift, although the plaintiff had previously worked the midnight shift, which had permitted him to work a second job with the City of Detroit. Another employee, Gunnar Bjarnesen (Bjarnesen), had been assigned to the midnight shift during the plaintiff's extended sick leave. The plaintiff charged that the shift realignment constituted another instance of discrimination which was imposed in retaliation for having filed a civil rights charge as a result of the November 1982 promotion of Horton. The record reflected that the plaintiff had terminated his employment with the City of Detroit and had not worked for it since November of 1982, although he testified that he intended to eventually return to that job. Horton testified that he was unaware of the plaintiff's employment status with the City at the time he assigned the plaintiff to the day shift and that he was concerned that assistance be available for the plaintiff should he require it in light of his back injury. The plaintiff worked the day shift for a period of one day, May 9, 1983, after which date he failed to return to his employment at either the Sisters' facility or the City of Detroit. The record further disclosed that at or about that time the plaintiff was awarded Social Security disability benefits, which he has continued to receive. In addition to facts relevant to the foregoing incidents, the plaintiff at trial adduced evidence of iso-

lated and unrelated racial epithets that he charged had been directed against certain black employees other than himself and that Bowman's children were permitted to use the swimming pool to the exclusion of other employee family members. Two former black employees offered factually unsupported opinions that their discharges had also been discriminatory.

Upon conclusion of the trial, the jury returned a verdict for the plaintiff and awarded him $1 as nominal actual damages and $150,000 in punitive damages against each defendant for an aggregate verdict of $300,002.[2] The defendants subsequently filed a motion for judgment notwithstanding the verdict (judgment NOV), new trial, or remittitur, asserting that the evidence was insufficient as a matter of law to support the jury's verdict against the defendants for either intentional discrimination or punitive damages. After a hearing, the district court granted the defendants' motion for judgment NOV and conditionally granted a new trial and entered judgment for the defendants. The plaintiff subsequently appealed to this court.

This court, upon appeal, is confronted with determining whether there was insufficient evidence in the record to present a question of fact for the jury's consideration thereby warranting the grant of judgment NOV. *Morelock v. NCR Corp.*, 586 F.2d 1096, 1104 (6th Cir. 1978), *cert. denied*, 441 U.S. 906, 99 S.Ct. 1995, 60 L.Ed.2d 375 (1979). The question is one of law for the reviewing court to resolve de novo. *Id.* at 1104-05. In considering whether the evidence is sufficient to support the verdict, this court may neither weigh the evidence, pass on the credibility of witnesses, nor substitute its judgment for that of the jury. Rather, the evidence must be

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[2]The plaintiff during pretrial proceedings voluntarily waived his claim for compensatory damages as barred by the exclusive remedy provision of the Michigan workers' compensation statute, which waiver was not placed in issue on appeal.

viewed in the light most favorable to the party against whom the motion is made, drawing from the evidence all reasonable inferences in that party's favor. *Id.* at 1104. A motion for judgment NOV is improper unless the evidence is such that there can be but one reasonable conclusion as to the proper verdict. *National Polymer Products, Inc. v. Borg-Warner Corp.*, 660 F.2d 171, 177-78 (6th Cir. 1981).

To state a claim under § 1981, the plaintiff must prove that the defendant discriminated against him in employment, namely, that the defendant treated him differently than its white employees, and that the disparate treatment was the result of a discriminatory purpose or intent. *See General Building Contractors Ass'n v. Pennsylvania*, 458 U.S. 375, 388-89, 102 S.Ct. 3141, 3148-49, 73 L.Ed.2d 835 (1982); *Reynolds v. Humko Products*, 756 F.2d 469, 472 (6th Cir. 1985); *Smith v. Pan Am World Airways*, 706 F.2d 771, 773 (6th Cir. 1983). The essential factual inquiry in such a case is whether the defendant intentionally discriminated against the plaintiff. *See U.S. Postal Service Bd. of Governors v. Aikens*, 460 U.S. 711, 715, 103 S.Ct. 1478, 1482, 75 L.Ed.2d 403 (1983); *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253, 101 S.Ct. 1089, 1093, 67 L.Ed.2d 207 (1981).

Mindful of the admonition imposed by existing precedent, this court is constrained to conclude that the district court erred in granting judgment NOV as it related to the plaintiff's claim of intentional discrimination premised upon defendants' promotion of Horton in lieu of the plaintiff. The district court's conclusion that the plaintiff failed to adduce evidence to establish that he was qualified for the supervisory position and thus failed to present a prima facie case of intentional discrimination was error. In essence, the district court reasoned that the plaintiff failed to produce evidence sufficient to permit the jury to reasonably conclude that the plaintiff's proffered qualifications for the position, i.e., a boiler operator's license and greater seniority, were relevant factors

in the defendants' promotional considerations. However, this court's examination of the record at trial disclosed that the testimony was conflicting as to the significance of a boiler operator's license, the relative qualifications of Horton and the plaintiff, and the circumstances attendant to the promotion of Horton. It would appear that the district court, in the course of ostensibly reviewing the evidence in the instant matter within the *McDonnell Douglas* framework, considered the weight to be assigned to the conflicting motivations ascribed to the employer for its actions. The question of discriminatory motivation is one of fact, and factual questions are traditionally within the domain of the jury. Additionally, circumstantial evidence is sufficient to support a finding of discriminatory intent. *Aikens*, 460 U.S. at 714 n.3, 103 S.Ct. at 1481 n.3. In sum, this court is of the opinion that the jury could have permissibly inferred discriminatory intent to Bowman from the circumstantial evidence presented at trial, albeit conflicting, in his promotion of Horton to the supervisory position in question rather than the plaintiff.

This court further concludes, however, that the district court's judgment NOV was appropriate with regard to the plaintiff's claim of discrimination premised upon the alleged "spying" incident and the alleged incident of retaliation arising from the plaintiff's assignment to the day rather than the night shift. The plaintiff produced no evidence whatsoever that he was treated differently from white employees or singled out for surveillance or any other form of "spying," nor did he indicate at the time that he complained of the incident that he believed it to be racially motivated. Moreover, the defendants' articulated legitimate, nondiscriminatory reason for the impromptu patrol as designed to curb vandalism remained unrebutted at the conclusion of all of the evidence. Similarly, the plaintiff failed to rebut the defendants' articulated reasons advanced in support of his shift assignment. Finally, the plaintiff's evidence of isolated racial incidents or epithets or purported disparate treatment of certain other black employees was wholly unsupported by facts and was

not connected with any asserted unlawful conduct regarding the plaintiff.[3]

In addition to moving for judgment NOV on the issue of intentional discrimination, the defendants charged that the evidence was insufficient as a matter of law to support an award of punitive damages. They correctly argued that a plaintiff who proves a cause of action under § 1981 may recover punitive damages where the plaintiff is entitled to an award of compensatory damages, even if nominal, only under circumstances where the "defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others." *Smith v. Wade*, 461 U.S. 30, 56, 103 S.Ct. 1625, 1640, 75 L.Ed.2d 632 (1983). *See also Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 460-61, 95 S.Ct. 1716, 1720, 44 L.Ed.2d 295 (1975); *Burkhart v. Randles*, 764 F.2d 1196, 1201-02 (6th Cir. 1985); *Stengel v. Belcher*, 522 F.2d 438, 444 (6th Cir. 1975), *cert. dismissed*, 429 U.S. 118, 97 S.Ct. 514, 50 L.Ed.2d 269 (1976). The imposition of punitive damages in civil rights actions has generally been limited to cases involving egregious conduct or a showing of willfulness or malice on the part of the defendant. *Wolfel v. Bates*, 707 F.2d 932, 934 (6th Cir. 1983).

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[3]The plaintiff's assignment of error charging that the defendants failed at the conclusion of all the evidence to renew their motion for a directed verdict, which the district court had earlier taken under advisement, was not presented to the district court despite ample opportunity to do so in the post-trial proceedings. A court does not view favorably the raising of such an issue for the first time on appeal. *See Halsell v. Kimberly-Clark Corp.*, 683 F.2d 285, 294-95 (8th Cir. 1982), *cert. denied*, 459 U.S. 1205, 103 S.Ct. 1194, 75 L.Ed.2d 438 (1983); *Bannert v. American Can Co.*, 525 F.2d 104, 111 (6th Cir. 1975), *cert. denied*, 426 U.S. 942, 96 S.Ct. 2662, 49 L.Ed.2d 394 (1976); *Moran v. Raymond Corp.*, 484 F.2d 1008, 1011-14 (7th Cir. 1973), *cert. denied*, 415 U.S. 932, 94 S.Ct. 1445, 39 L.Ed.2d 490 (1974). Accordingly, the plaintiff's objection in this respect was waived in light of the proceedings in the court below.

In the absence of any evidence of egregious conduct, willfulness, or malice on the part of the defendants, the district court correctly concluded that it was improper to permit the jury to find that either Bowman or the Sisters acted with evil intent or callous, reckless, or egregious disregard of the plaintiff's federal rights, assuming arguendo that their conduct constituted purposeful discrimination in the first instance. After scrutinizing the record, this court concludes that, while the plaintiff presented sufficient evidence to submit to the jury the issue of intentional discrimination with respect to the Horton promotion, no testimony was adduced evidencing the requisite malice or reckless or callous indifference of an egregious character on the part of either defendant as to support a jury verdict imposing punitive damages. Accordingly, the defendants were properly entitled to judgment NOV on the plaintiff's claim for punitive damages.[4]

Having concluded that the district court's grant of judgment NOV was appropriate as it related to the claim for punitive damages and in the absence of any claim for compensatory damages beyond the nominal actual damages awarded by the jury, this court has no occasion to consider the district court's conditional grant of a new trial, based upon the charged excessive punitive damage award, despite this court's

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[4]The district court's observations contained in its memorandum opinion regarding the insufficiency of the evidence bearing upon proof of malice or reckless or callous disregard necessary to an award of punitive damages, although incorporated into its disposition of the defendants' conditional motion for a new trial, are properly construed as initially bearing upon its grant of the defendants' motion for judgment NOV and only secondarily if at all to the defendants' conditional motion for a new trial. In any case, however, it clear that the defendants' motion for judgment NOV was expressly premised upon the insufficiency of the evidence at trial to support either liability for intentional discrimination in the first instance or liability for punitive damages. Based upon the conclusions stated in the text, the defendants were properly entitled to judgment NOV on the plaintiff's claim for punitive damages.

decision to reverse the district court's grant of judgment NOV arising from the plaintiff's claim of discrimination anchored in the Horton promotion. The court observes that Rule 50 provides that, in the event that a motion for a new trial has been conditionally granted by the district court and the grant of judgment NOV is subsequently reversed on appeal, as here, the new trial will proceed unless the appellate court has otherwise ordered, and in an appropriate case the appellate court may also reverse the conditional grant of a new trial and direct that judgment be entered upon the jury verdict. Fed.R.Civ.P. 50(c)(1) & adv. comm. note. The instant case therefore will be remanded to the district court to enter judgment for the plaintiff consistent with the verdict of the jury as to the defendants' liability for discrimination, but only as to nominal damages and not as to punitive damages.

Accordingly, the judgment of the district court is REVERSED insofar as it entered judgment for the defendants notwithstanding the jury verdict with respect to the defendants' liability on the plaintiff's claim of discrimination in violation of § 1981, AFFIRMED insofar as it entered judgment for the defendants notwithstanding the jury verdict with respect to the defendants' liability for punitive damages in any amount, and REVERSED insofar as it granted the defendants' conditional motion for a new trial, and the case is REMANDED to the district court with directions to enter JUDGMENT for the plaintiff consistent with the jury verdict but only insofar as the verdict determined that the defendants were liable for unlawful discrimination against the plaintiff and only insofar as the verdict awarded to the plaintiff nominal actual damages and not punitive damages.

Judge Ryan concurs in the result.

EDWARDS, Senior Judge, dissenting. This is a strange case. It might be called the "face in the window" case since one of the episodes relied upon by this black plaintiff-appellant concerned a white face which appeared in the nighttime in the basement window of the power house where he was then employed. The face disappeared without identification or explanation. Plaintiff was injured seeking to chase and identify the face. There is testimony in this record that the face belonged to a member of an all white surveillance patrol which had been initiated by defendants without notice to employees.

Plaintiff also claimed intentional race discrimination in two other episodes. One such pertained to defendants' failure to promote him for a position for which he had seniority over the white person who got the job. The other claim relates to an allegedly discriminatory change of his employment shift. As the majority opinion points out in detail, there were explanations proffered by the defendants concerning each of these episodes from which the jury could have found the facts in favor of the defendants on the basis of explanations of a non-discriminatory character.

The case is before us, however, because it was tried before a jury which obviously found the disputed facts in favor of the plaintiff. The plaintiff during pretrial proceedings had voluntarily waived his claim for compensatory damages as barred by the exclusive remedy provision of the Michigan workers' compensation statute. The jury therefore awarded plaintiff only $1.00 in nominal damages against the two defendants. The jury, however, also awarded $150,000 in punitive damages against each defendant for an aggregate verdict of $300,002.

Contrary to the majority opinion, I find factual support in this record for the jury's award of damages based upon race discrimination and punitive intent. Our question, of course, is not whether we would have decided disputed issues

of fact as did the jury, our question is whether or not the jury had facts before it sufficient to support its judgment.

In my view, the majority opinions would allow the District Court to substitute its view of the disputed facts for the view taken by the jury. This is not the role of either the District Court or the Court of Appeals. See generally *Anderson v. City of Bessemer City, North Carolina,* 470 U.S. 564, 105 S.Ct. 1504 (1985).

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

IRVIN M. BEAUFORD,

Plaintiff,

v. **JUDGMENT**

SISTERS OF MERCY-PROVINCE OF DETROIT, INC., and CLARK BOWMAN, Jointly & Severaly,

Defendants.

Shrauger, Dunn, & Aronson, P.C., by GARY A. BENJAMIN, Detroit, MI, appeared for Plaintiff

Bodman, Longley & Dahling, by DAVID CHARDAVOYNE, appeared for Defendants.

This action came on for trial before the Court and a jury, Honorable Ralph M. Freeman, District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict in favor of Plaintiff and against each Defendant in the amount of $1.00 nominal damage and $150,000.00 punitive damage, and a motion

for directed verdict, for judgment nothwithstanding the verdict, for new trial, or for remittutur having been filed by Defendants and heard by this Court, and the Court having fully considered the pleadings and arguments of counsel, and a Memorandum Opinon having been entered by this Court on Defendant's motion on June 4, 1985,

IT IS HEREBY ORDERED AND ADJUDGED that Defendants' motion for judgment notwithstanding the verdict be granted in accordance with the Memorandum Opinion entered by this Court on June 4, 1985, and that judgment for Defendants be entered and Plaintiffs take nothing.

DATED: June 24, 1985

RALPH M. FREEMAN
UNITED STATES
DISTRICT JUDGE

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NO. 85-1477/1631

IRVIN M. BEAUFORD,

Appellant,

v. **ORDER**

SISTERS OF MERCY-PROVINCE OF DETROIT, INC., and CLARK BOWMAN, SR., Jointly & Severally,

Appellees.

BEFORE: KRUPANSKY and RYAN, Circuit Judges, and EDWARDS, Senior Circuit Judge

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submmission and decision of the case, Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT
BY JOHN P. HEHMAN, CLERK

PROOF OF MAILING

STATE OF MICHIGAN)
:ss
COUNTY OF WAYNE)

LINDA L. SMITH, being first duly sworn, deposes and says that she did mail a true and correct copy of the foregoing document, Plaintiff's Petition for Certiorari, upon the Attorney for the Defendants, by enclosing said document, in an envelope clearly addressed to: Mr. David Chardavoyne, Esq., 34th Floor, 100 Renaissance Center, Detroit, MI 48243 and, with sufficient postage thereon affixed, she did deposit said envelope in a United States mail box on the 3rd of August, 1987.

Linda L. Smith
LINDA L. SMITH

Subscribed and sworn to before me
this 3rd day of August, 1987.

Barbara A. Giusti
BARBARA GIUSTI, Notary Public
Macomb County, Michigan
My Commission Expires: 1/24/88